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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Siskiyou)

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DOROTHY BUCKLEY,

Plaintiff and Appellant,

v.

JOHN D. DURNEY,

Defendant and Respondent.

C060340

(Super. Ct. No.  
SCCVPO0700150)

Casey Grasso (Grasso) died from sepsis caused by an abscessed wisdom tooth. Grasso's sole heir was his mother, plaintiff Dorothy Buckley, who sued Grasso's dentist, defendant John D. Durney, for dental malpractice. The trial court granted defendant's motion for summary judgment, and this appeal followed. Plaintiff challenges the trial court's statement of reasons, the declarations submitted by defendant's experts, and the court's ultimate conclusion granting summary judgment. We agree with plaintiff that triable issues of fact remain and therefore reverse the judgment of dismissal.

## STANDARD OF REVIEW

As this court succinctly described, “[s]ummary judgment is properly granted if there is no question of fact and the moving party is entitled to judgment as a matter of law. [Citations.] We construe the moving party’s papers strictly and the opposing party’s papers liberally. [Citation.] The moving party must demonstrate that under no hypothesis is there a material factual issue requiring a trial, whereupon the burden of persuasion shifts to the opposing party to show, by responsive statement and admissible evidence, that triable issues of fact exist. [Citations.]

“However, ‘[f]rom commencement to conclusion, the moving party bears the burden of persuasion that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.] On appeal, we exercise our independent judgment to determine whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law.” (*Thousand Trails, Inc. v. California Reclamation Dist.* No. 17 (2004) 124 Cal.App.4th 450, 457; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843-857.)

“In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party

[citation], liberally construing her evidentiary submission while strictly scrutinizing [defendant's] own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.)

### FACTS AND PROCEEDINGS

The following facts are taken from materials submitted in conjunction with the summary judgment proceedings.

Grasso began to see defendant for dental care in 2004. Because Grasso had chronic gum disease and infection, defendant recommended that Grasso see an oral surgeon to have his teeth extracted in preparation for full upper dentures. This work was never done. Defendant continued to treat Grasso through October 2005 and repeatedly advised him of the need to see an oral surgeon. At times, defendant prescribed pain medication and antibiotics to treat the symptoms of infection.

On January 5, 2006, Grasso went to a hospital emergency room with dental pain in his left jaw. He rated his pain as an "8" on a 1-10 scale, and said he had had swelling for several days. The hospital records noted that the left lower wisdom tooth was "rotted" and the left lower jaw was slightly tender and swollen. The medical records also noted, "[Defendant's] office called. He hasn't been in since 9/2005 was referred to oral surgeon then, given Vicodin 10/05." The emergency room doctor diagnosed a dental abscess and prescribed Vicodin and

amoxicillin. He instructed Grasso to follow up with his dentist that day.

Grasso went to defendant's office six days later, on January 11. Defendant examined him and found a dental abscess around the wisdom tooth; the area was red and swollen. According to defendant, Grasso was not in pain and did not have obvious swelling, but he prescribed Keflex (which he categorized as a "super penicillin") for Grasso's usual chronic infection as well as Vicodin.

Grasso was found dead in his home on the morning of January 13, 2006. The coroner concluded that the cause of death was sepsis resulting from a dental abscess. The abscess had been present for days, and the sepsis occurred within hours of death. No internal examination was performed because the cause of death was "obvious."

In her complaint for dental negligence, plaintiff alleged that defendant "provided inadequate, improper, substandard and/or negligent care, diagnosis, testing, evaluation, and/or treatment," "failed to timely, adequately and/or properly administer or prescribe adequate antibiotic or antiviral agents," "failed to timely, adequately and/or properly diagnose, test, evaluate and/or treat [Grasso]," "and/or failed to timely, adequately and/or properly refer . . . Grasso to an appropriate expert or specialist for . . . treatment." She alleged that defendant's negligence caused or contributed to a worsening of Grasso's condition and led to his death from complications related to the abscess.

In his motion for summary judgment, defendant submitted declarations from two dental experts who outlined Grasso's history as a noncompliant patient and who opined that defendant met the standard of care in treating him. Defendant also argued that sepsis might not have been the cause of death and that Grasso's noncompliance with medical advice led to the infection which might have caused his death.

In opposition, plaintiff submitted the emergency room records which detailed Grasso's visit a few days before seeing defendant. She also submitted a declaration from a dental expert who concluded that defendant was negligent in treating Grasso's wisdom tooth. The expert explained that an abscess in a wisdom tooth is particularly dangerous and can lead to sepsis. He also opined that defendant fell below the standard of care because he was aware that Grasso had been having recent serious problems, as evidenced by the call to defendant's office from the emergency room staff.

Plaintiff also complained that the declarations of defendant's experts were unsupported by any evidence. After a hearing, the trial court denied defendant's summary judgment on the causation issue but continued the hearing on the standard of care issues to permit defendant to introduce medical records and plaintiff to depose additional witnesses. The court also set a schedule for supplemental briefing by the parties.

The court subsequently granted defendant's motion for summary judgment, concluding no triable issues of fact remained. Plaintiff appeals from the ensuing judgment.

## DISCUSSION

### I

#### *Procedural Challenges*

Plaintiff raises two procedural challenges to the court's summary judgment ruling, asserting that (1) the trial court did not issue a written ruling explaining its reasons for granting summary judgment as required by Code of Civil Procedure section 437c, subdivision (g) (unspecified section references that follow are to the Code of Civil Procedure), and (2) the declarations from defendant's experts lacked any foundational basis and defendant therefore failed to meet his preliminary burden of persuasion, necessitating a denial of his summary judgment motion. Given our conclusion that triable issues of fact remain (discussed below), we need not resolve these claims but we briefly explain why they do not withstand scrutiny.

##### *A. Adequacy of Court's Statement of Reasons*

Section 437c, subdivision (g) provides in relevant part: "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination. The court shall record its determination by court reporter or written order."

At the hearing on March 20, 2008, the court explained at length its decision to grant summary judgment. No reporter was present at that proceeding, but the hearing was audio recorded.

The trial court's ultimate order attached a transcript of this proceeding and stated, "The Court's reasons and the evidence supporting the ruling granting defendant's motion for summary judgment, as stated on March 20, 2008, are set forth in the attached transcript. The record of the hearing on March 20, 2008, this ruling, and the attached transcript, now constitute the entire record with respect to the Court's decisions on the defendant's motion for summary judgment."

"A statement of reasons is sufficient if it allows for meaningful appellate review." (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448.) By incorporating the transcript of proceedings, the trial court's statement of reasons does precisely that. There was no error.

#### *B. Declarations of Plaintiff's Experts*

In his initial motion for summary judgment, defendant submitted declarations from two experts, Dr. Charles Syers and Dr. David Miller, both of whom believed defendant met the requisite standard of care. Plaintiff contends that while the court overruled her hearsay objections to these declarations, the court did not rule on her other objections, namely, that the experts assumed facts not in evidence and that their opinions were based on speculation and conjecture. Additionally, citing cases such as *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735,

plaintiff argues that because defendant did not submit any underlying medical records, there was no factual basis to support the experts' opinions that defendant met the standard of care. Consequently, she asserts, defendant failed to meet his initial burden under summary judgment standards and the trial court should have denied the motion. We disagree.

First, to the extent plaintiff complains that the trial court failed to rule on all of her evidentiary objections, we deem the objections forfeited. The Supreme Court is currently deciding whether evidentiary objections are preserved for appeal if they are not expressly ruled upon at the time of decision on a summary judgment motion. (*Reid v. Google, Inc.* (2007) 155 Cal.App.4th 1342, review granted Jan. 30, 2008, S158965.) In the meantime, we continue to concur with the prevailing view that a party who fails to obtain a ruling on its timely evidentiary objections forfeits appellate review of those objections. (*Madden v. Del Taco, Inc.* (2007) 150 Cal.App.4th 294, 301; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 68; see also *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

Second, contrary to plaintiff's contention, it is not dispositive that defendant's separate statement of undisputed facts failed to reference the medical records that were submitted pursuant to the continuance. We note that these same records had been submitted by plaintiff in conjunction with her opposition to summary judgment. More importantly, "[w]hether to consider evidence not referenced in the moving party's separate



statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an abuse of that discretion." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316.) Plaintiff has not demonstrated any abuse of discretion by the trial court.

Third, and most importantly, the adequacy of the experts' declarations when first filed became irrelevant once plaintiff agreed to an extension to permit defendant to file additional supporting materials. We briefly outline the chronology of events.

At the summary judgment hearing, plaintiff argued that because the experts' opinions were not supported by admissible evidence, the declarations were insufficient even to shift the burden of persuasion to plaintiff and the court was required to deny the summary judgment motion. At the same time, plaintiff sought a continuance to take the depositions of the emergency room doctor and defendant's staff.

The court decided to "allow the continuance requested by the plaintiff on the condition that the defense be allowed to submit declarations that will place in evidence the records that we have all been talking about so that we get that issue resolved." The parties discussed and agreed to a schedule for this additional discovery and briefing.

Defendant subsequently filed a declaration attaching Grasso's medical records and excerpts from the pathologist's deposition. He also submitted supplemental declarations from

his two dental experts and a different pathologist. Although afforded an opportunity to file a written response, plaintiff instead submitted only a request for a further continuance because she had been unable to depose the emergency room doctor. She did not challenge the adequacy of the expert declarations in light of the newly filed records but instead focused exclusively on whether this evidence demonstrated a triable issue of fact.

On appeal, the parties continue to argue about whether records must be submitted to support the opinions of medical experts and whether defendant's supplemental material was properly filed. However, there is a more fundamental problem. Plaintiff agreed to permit defendant to file the materials she had asserted were missing and, once these documents were filed, she raised no further challenge to the declarations until her motion for reconsideration. Plaintiff has forfeited any claim of error and her contentions are not cognizable on appeal.

(§ 437c, subdivision (b)(5); *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676-677.)

We turn to the merits of the summary judgment motion.

## II

### *Triable Issues of Fact*

Plaintiff contends that the trial court erred in granting summary judgment because triable issues of fact remain. We agree.

This case presents a classic battle of expert opinions on the question of whether defendant met the requisite standard of care. "In summary judgment or adjudication motions, conflicting

declarations from experts on opposing sides usually establish a triable issue of fact.” (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 539; see also *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.)

In support of his motion for summary judgment, defendant presented the declarations of two dental experts. One, Dr. Syers, outlined defendant’s care of Grasso since 2004 and continued, “On January 11, 2006, . . . Grasso came into [defendant’s] office asking for medications. He denied pain and there was no swelling of the jaw area noted. [Defendant] again repeated his advice that . . . Grasso needed to see an oral surgeon. [Defendant] appropriately prescribed an antibiotic and twenty pain pills. [Defendant] did nothing to cause a dental abscess. The medical records for this visit do not indicate that . . . Grasso exhibited any signs or symptoms of sepsis.” He stated that “[t]he cause of death from a dental abscess may or may not be the real cause of death,” and concluded that “[defendant] used the level of skill, knowledge, and care in treatment of . . . Grasso that other reasonably careful dentists would use in the same or similar circumstances.”

Another dentist, Dr. Miller, also outlined defendant’s treatment of Grasso over the years and stated that Grasso delayed needed treatment “until he had another acute problem.” He provided a description of the January 11 visit identical to that of Dr. Miller. He concluded that Grasso “did not exhibit any signs or symptoms on January 11, 2006, that would have

reasonably caused [defendant] to be concerned about health issues that would have required emergency medical treatment. [Defendant] had appropriately and repeatedly referred . . . Grasso to an oral surgeon and to the emergency room. Until such time as . . . Grasso followed up with oral surgery, [defendant] could only treat symptoms of an acute infection, such as pain and swelling, by prescribing antibiotics and pain pills. For over three years, [defendant] made every effort possible to help . . . Grasso obtain treatment. Antibiotics would be helpful in keeping . . . Grasso's infection under control, but without removing the teeth, the infection can persist in a chronic state. There was no other treatment that [defendant] could have provided to . . . Grasso, who remained noncompliant." He opined that defendant used "the level of skill, knowledge, and care in treatment of . . . Grasso that other reasonably careful dentists would use in the same or similar circumstances."

In opposition to the motion for summary judgment, plaintiff submitted records showing that Grasso went to the local hospital emergency room on January 5, 2006, complaining of dental pain and swelling in his lower left jaw for the past few days. He reported his pain as an "8" on a 1-10 scale. The medical records note that the lower left wisdom tooth was "rotted" and that the jaw was slightly tender and slightly swollen. Grasso reported that he had seen defendant one month earlier and that defendant had referred him elsewhere for extractions that he had not yet received. The medical records indicate: "[Defendant's] office called. He hasn't been in since 9/2005[,] was referred

to oral surgeon then, given Vicodin 10/05." The emergency room physician prescribed amoxicillin and Vicodin and referred Grasso back to the dentist.

Plaintiff also submitted a declaration from her dental expert, Dr. Marc Salomone. Dr. Salomone recounted Grasso's visit to defendant on January 11 and noted that defendant admitted that on that date "he believed [Grasso] was suffering from a mouth infection, and conceded during his deposition that [Grasso] was suffering from a dental abscess around tooth 17, the wisdom tooth on the left lower jaw, which was red and swollen. [Defendant] prescribed . . . Keflex, which he described as a 'super penicillin,' and Vicodin. [Defendant] did not direct [Grasso] to see or be evaluated by any medical doctor, nor did he suggest that [Grasso] go to an emergency room of any hospital."

He continued, "[Grasso] died less than 48 hours later on January 13, 2006 from sepsis caused by dental abscesses in his left lower jaw. [¶] It is my opinion that the care provided to [Grasso] on January 11, 2006 by [defendant] fell below the standard of care since [Grasso] was at risk of developing a systemic infection, including sepsis, due to the abscess in tooth 17, a wisdom tooth in the left lower jaw. Abscesses in wisdom teeth are particularly dangerous since the root structure extends a considerable distance down the neck and can readily lead to rapid, systemic progression of infection to other parts of the body and develop into sepsis. Sepsis is a systemic infectious process."

Dr. Salomone also stated in his deposition: "I am informed and believe that [defendant] and/or his office were contacted by the emergency department of Fairchild Medical Center on January 5, 2006. [¶] Based on the Fairchild Medical Center Emergency department record for January 5, 2006, [defendant] knew and/or should have been aware on January 11, 2006 that [Grasso's] infection and abscess in tooth 17 had been significantly problematic for at least six days by the time [defendant] saw [Grasso] on January 11. [Defendant] knew and/or should have known that there was an extreme risk that as of January 11 the abscess in tooth 17 would spread beyond tooth 17, develop into sepsis and spread systemically, which is a life threatening condition.

"It is my opinion that the standard of care on January 11, 2006 required that [defendant] refer [Grasso] to a medical doctor to properly treat the abscess; refer [Grasso] to an emergency room for immediate medical treatment including possible IV antibiotic therapy; and at the very least take additional x-rays of the tooth to determine the extent of the abscess and infection." He further opined that defendant's failure to take any of these steps fell below the standard of care and caused or contributed to Grasso's death.

Defendant filed supplemental declarations from his experts. Dr. Sayers questioned whether defendant knew of Grasso's emergency room visit on January 5, but opined that even if defendant was aware of that visit, Grasso did not exhibit any symptoms on January 11 that would have necessitated a hospital

referral. He also stated that "[o]ral and intravenous antibiotics essentially do the same thing in treating an infection." In his supplemental declaration, Dr. Miller stated that Grasso did not exhibit any symptoms on January 11 that "would have caused [defendant] to be concerned about health issues that would have required emergency medical treatment," and he asserted additional x-rays were unnecessary.

Defendant contends that summary judgment was proper because there was no evidence that he knew anything about Grasso's visit to the emergency room on January 5, did not notice any swelling on Grasso on January 11, and did not observe Grasso to be in any pain at that visit. Triable issues of fact exist on each of these points.

The hospital records indicate that the emergency room contacted defendant's office during Grasso's visit to the emergency room on January 5 and obtained information from someone about Grasso's earlier dental treatment. In his deposition, defendant stated only that he did not recall speaking to anyone from the emergency room and did not know if any of his staff had advised him that they had received such a call. Drawing all reasonable inferences in favor of plaintiff, a trier of fact could conclude that someone from the hospital talked to someone in defendant's office about Grasso's medical history, and whoever it was gave Grasso's personal medical information to the hospital. While the record does not indicate what information the emergency room conveyed to defendant's office about Grasso's condition on January 11, a trier of fact

could also reasonably conclude that inquiries about dental health from emergency room personnel should have alerted defendant to the fact that Grasso had a serious problem.

Moreover, even without considering the events of January 5, triable issues of fact exist as to the adequacy of care rendered on January 11. Although defendant asserts that he did not see any swelling and that Grasso did not appear to be in pain, defendant's own actions and statements counter that claim. Grasso exhibited more than his usual chronic infection. Defendant stated in his deposition that he noticed that Grasso's wisdom tooth was abscessed, red and swollen, and he prescribed Vicodin, a painkiller, and Keflex, a strong antibiotic.

Defense experts asserted that defendant did all that was required under the circumstances and they pointed out that defendant in fact prescribed oral antibiotics. However, plaintiff's expert described the inherent dangers of an abscessed wisdom tooth, and opined that, among other steps, Grasso should have been referred for immediate medical care, including possible intravenous antibiotics. The issue was not whether Grasso exhibited signs of sepsis on January 11; it is whether Grasso's abscessed tooth posed a risk of *developing* sepsis. Although defendant's expert stated that oral and intravenous antibiotics "essentially do the same thing in treating an infection," a reasonable trier of fact could nonetheless conclude that the experts' conflicting opinions indicated that one course of treatment might be advisable over another under certain circumstances, particularly given



defendant's emphasis on Grasso's failure to comply with medical recommendations. As the trial court itself commented, "I think we all understand that I.V. is more effective and more direct and faster, more reliable in some sense . . . ."

"[W]hen considering the declarations of the parties' experts [in summary judgment proceedings], we liberally construe the declarations for the plaintiff's experts and resolve any doubts as to the propriety of granting the motion in favor of the plaintiff." (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-126.)

Here, given the conflicting inferences from the record and the conflicting opinions of dental experts, triable issues of fact remain on the question of whether defendant met the standard of care. Under these circumstances, summary judgment is not appropriate.

#### DISPOSITION

The judgment is reversed. Plaintiff is awarded her costs on appeal.

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HULL, Acting P. J.

We concur:

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ROBIE, J.

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CANTIL-SAKAYUE, J.